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MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States.**

OCTOBER TERM, 1975.

No. 75-1465.

**ATLANTIC TUBING & RUBBER COMPANY,
PETITIONER,**

v.

**INTERNATIONAL ENGRAVING COMPANY,
RESPONDENT.**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.**

Reply Brief for Petitioner.

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Argument.

Respondent's argument that certiorari should be denied because there is an "independent basis" to support the judgment below (respondent's brief, pp. 8-9) does not apply. The argument assumes that, because a party offers evidence to a jury, that evidence must be believed. This is not the law.

See *Cardente v. O'Leary*, 276 A. 2d 751, at 753 (R.I. 1971). Here, the jury did not believe the respondent's so-called "uncontradicted" evidence. The jury found negligence, proximate cause and that the negligence of both parties caused the accident (App. 28-30). The jury could not have made these findings if it had believed the journals had been replaced and had not been manufactured by the respondent.

The respondent's "independent basis" argument illustrates how a jury can be manipulated or confused by successive sets of special questions, and, consequently, the reason why this Court should grant certiorari. The respondent and the two lower courts isolate a finding of the jury in the second set of questions as a basis for an inconsistency, and as an "independent basis" to support a judgment for respondent. Yet, it was only the second set of questions which gave rise to this inconsistency and this "independent basis." In fact, at no time did the trial court or the appellate court find the first set of jury responses to be inconsistent. The "possibility of inconsistent answers" (respondent's brief, p. 4) cannot justify the second set of questions in light of the decisions of this Court. See *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Limited*, 369 U.S. 355 (1962).

The creation of an inconsistency by a second set of questions, and then the use of this inconsistency as an "independ-

ent basis" of judgment, demonstrates that this Court should grant certiorari in order to clarify the uses and abuses of Rule 49.

Respectfully submitted,
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